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IN THE

Supreme Court of the United States

October Term, 1982

SEARS, ROEBUCK AND COMPANY
Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE
WASHINGTON SUPREME COURT

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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I. INTRODUCTION.

The clash between the State's Motion to Dismiss or Affirm and Sears'[1] Jurisdictional Statement has focused at least three substantial federal questions:

(i) Does a tax imposed directly on protected speech pass First Amendment muster solely by reason of being "general"?

1. A list of Sears' subsidiaries appears in the Jurisdictional Statement at 1, n.1.

(ii) Is a state revenue interest categorically insufficient to outweigh First Amendment protection of commercial speech? Alternatively, is the instant revenue interest insufficient?

(iii) Can a "substantially" protected commercial speaker invoke overbreadth analysis to challenge a statute also infringing *fully* protected speech?

We address here the first two questions to correct what we perceive as errors in the State's treatment of the record. We believe part IV of Sears' Jurisdictional Statement, particularly footnote 22, sufficiently covered the State's contention as to the third question.

II. THE STATE'S ARGUMENT THAT THE DECISION BELOW RESTS ON AN ADEQUATE NON-FEDERAL BASIS IS CONTRARY TO THE RECORD.

The Washington court upheld the instant tax solely on the ground that: "[T]his is a general tax for the support of government which under the test of *Grosjean v. American Press Co.*, [297 U.S. 233 (1963)], is not violative of the First Amendment." (Juris. Statement at A-4.) The State has endorsed that court's failure to look beyond the "general" nature of the tax: "In other words, if the tax is general, the inquiry ends." (Motion at 8.) Both the court below and the State assert that no analysis as to whether the tax directly (or merely tangentially) impacts speech is necessary.[2] Having thus helped to focus the federal question (whether a tax imposed directly on protected speech is saved solely by being "general"), the State attempts to sidestep that question and to substitute a state law question of statutory construction.

In response to Sears' *alternative* argument that the 1955 amendment "singles out" distribution of speech, the Washington court held that *prior law* would have been

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2. At the outset of its opinion, the Washington Supreme Court adopted the constitutional principle that "[a] general tax which only tangentially impacts constitutionally protected speech is valid." (Juris. Statement at A-2.) However, that court's subsequent analysis ignored the "tangential impact" requirement.

sufficient to tax Sears' distribution. The court said no more than that, but the State has seized upon that construction to frame an entirely new question for this Court:

> So construed, the threshold question for this Court is whether the general use tax as applied to Sears' *storage and withdrawal of storage* of its catalogs infringes on Sears' First Amendment rights.

Motion to Dismiss or Affirm at 5 (emphasis added).

A. The State's "Storage, Withdrawal" Hypothesis Is Contrary to the Record.

By claiming that the tax was imposed on "storage and withdrawal from storage,"[3] the State attempts to shift this Court's focus from the *distribution* of Sears' written speech to other acts that might, in some cases, be taken prior to such distribution. But there is no factual basis in the record for the *storage and withdrawal* argument. As the parties stipulated, the catalogs were *shipped directly* from the *out-of-state printer* to the local stores for distribution to

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3. RCW 82.12.010(2) provides:

> "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state; . . .

customers.[4] The State, in fact, has mentioned storage and withdrawal for the first time in its motion to this Court.[5]

Not only the factual record, but the lower court's decision is devoid of any mention of storage or withdrawal. If the Washington court had intended to distinguish between distribution and such acts preparatory to distribution, one would expect to find some reference to "storage and withdrawal," or the like, somewhere in its opinion. There is no such reference.

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4. The statute relied on by the State for its "storage and withdrawal" argument applies to the " first act within this state by which the taxpayer takes or assumes dominion and control." RCW 82.12.010(2). It *includes* "storage, withdrawal from storage" as two examples of taking dominion and control. Lacking support in the record for specific acts of "storage, withdrawal," the State would have to retreat to the more general "dominion and control" language of the statute. But that would require that this Court draw an untenable line between the *distribution* of written speech and the "dominion or control" manifested by that distribution.. Acceptance of such a semantic distinction would eviscerate the First Amendment. It is impossible to distribute commercial (or any other) literature without taking "dominion or control" over it. Even "storage and withdraw" (had they occurred) preparatory to distribution would be indistinguishable from the distribution itself.

Indeed, a tax on taking control of literature to effect distribution cannot be reconciled with *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) or *Follett v. McCormick*, 321 U.S. 573 (1944). The State distinguishes *Murdock* and *Follett* as involving license taxes "directed at prerequisites to acts of speech." (Motion at 6.) How would the State characterize "tak[ing] dominion and control" of printed material for distribution if not as a "prerequisite to acts of speech"?

5. In attempting to distinguish *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 314 N.W.2d 201 (Minn. 1981), *prob. juris. noted*, No. 81-1839, _____ U.S. _____, 102 S. Ct. 2955 (1982), the State has glossed over its "storage and withdrawal" contention. The tax there was on the consumption of paper and ink to produce a newspaper subsequently sold to the public. If, as the State asserts, the tax here were on "storage and withdrawal" for distribution, the instant tax would impact speech at a stage closer to actual distribution than does the Minnesota tax. Under the State's own argument, the presence of a substantial federal question in the *Minneapolis Star* case logically indicates, *a fortiori*, the presence of such a question in the instant case.

The State also asserts that it makes no difference that the Minneapolis Star newspaper is revenue-producing, while Sears' catalogs are distributed

B. The Washington Court Did Not Misread the Factual Record as the State Has and Decided a Federal (Not State) Law Question.

The Washington court held that the tax is constitutional, even though it was imposed on the distribution of catalogs. The State has badly mischaracterized that as a holding that the Washington tax was not imposed on the distribution of catalogs.[6]

Both the Washington Supreme Court and the superior court framed the issue in terms of "use taxes paid for [Sears'] *distribution* of catalogs." (Juris. Statement, A-1, A-7 (emphasis added).) It is the distribution—the act of speech itself—whose taxation invokes this Court's jurisdiction.

III. THE COMMERCIAL SPEECH DOCTRINE APPLIES TO THIS CASE.

A. First Amendment Protection Is Not Limited to Total Prohibitions of Speech.

The State argues that a tax on commercial speech lies outside the ambit of First Amendment protection because this Court's commercial speech decisions "all involve complete state bans of such speech." (Motion at 9.) This Court has placed no such limitation on commercial speech

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Footnote 5 (con't)

free of charge. (Motion at 5, n.4.) Sears has consistently acknowledged that the *privilege of selling* written speech is a legitimate incident of taxation. (Juris. Statement at 5, n.5.) The selling privilege may be a pertinent factor in the *Minneapolis Star* case; it is absent here.

6. Contrast the Washington court's own expression of its holding with the State's characterization:

> The Court:
>
> We believe the record and the history regarding the application of the use tax to the Sears catalogs demonstrates this is a general tax for the support of government which under the test of *Grosjean v. American Press Co., supra*, is not violative of the First Amendment. Since this is the nature of the tax, there is no constitutional issue involved. Therefore, it is unnecessary to consider whether the "commercial speech" which Sears claims it is exercising is afforded First Amendment protection or whether the statute is constitutionally overbroad . . . . (Juris. Statement at A-4-5).

protection. Moreover, the fact that a tax on commercial speech presents a *novel* question is hardly a ground for declining to exercise jurisdiction.

This Court has recognized that a direct tax on speech is tantamount to a total ban and has refused to permit such taxes: "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943). The instant tax is not merely a regulation of time, place or manner, but applies at *all times* and *all places* to *all manner* of commercial catalog distributions. Such a tax is tantamount to a ban because it has exactly the same effect on those who cannot afford it or find it uneconomic to pay.[7] That is why this Court has consistently struck down direct taxes as well as outright bans on protected speech.

B. The State's Revenue Interest is Constitutionally Insufficient to Sustain a Tax on Distribution of Commercial Speech.

A tax on a First Amendment right bears a heavy presumption *against* its constitutionality. *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958). This Court has never permitted taxation of protected speech merely for revenue purposes.[8]

Footnote 6 (con't)

The State:

> Because the Washington court determined that the tax in question was not one levied upon an act of speech, including any act of distribution of catalogs, the Washington court upheld the tax without reaching the commercial speech or overbreadth issues raised by Sears. (Motion at 2).

7. Consumers also have a stake in "the free flow of [commercial] information" necessary to make informed economic decisions. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (competitive drug price information). Sears' catalog advertising provides consumers with competitive price and quality information on a wide variety of goods, including medical supplies, hearing accessories, orthopedic and arthritic devices, and health and safety aids, as well as clothing and other basic necessities. Moreover, Sears' catalog makes such information and products available to persons who, for physical or geographic reasons, may be otherwise unable to obtain them.

8. In striking down general revenue taxes on speech, the courts have consistently distinguished a "nominal fee" to defray the cost of

In the context of commercial speech, the four-part test articulated by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980), requires that the challenged state law advance a "substantial" government interest. In its Motion at 10, the State asserts merely that revenue "from a broad tax base" is "an important interest of government." While the basic use tax does indeed provide revenue from a broad tax base, the use tax as generally applied is not at issue. Only the *extension* of the use tax to distributors of catalogs, and only the *incremental* revenue generated by that extension, are at stake here.[9] A less substantial government interest can scarcely be imagined.

IV. CONCLUSION

The constitutional questions on appeal are substantial. The motion to dismiss or affirm should be denied and probable jurisdiction noted.

Respectfully submitted,

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Footnote 8 (con't)

administering legitimate regulation of First Amendment activity. *See Murdock*, 314 U.S. at 113-14; *Bayside Enterprises, Inc. v. Carson*, 450 F.Supp. 696, 704 (M.D. Fla. 1978); *Moffett v. Killien*, 360 F.Supp. 228, 231-32 (D. Conn. 1973) (three-judge court).

9. Sears challenges RCW 82.12.010(5) as invalid on its face. If, as the State contends and the Washington court held, the use tax would apply to commercial catalog distribution even without the extension of RCW 81.12.010(5), then the use tax is invalid as applied to such distribution.